SEE TEOW GUAN & ORS

v.

LIQUDATORS OF KIAN JOO HOLDINGS SDN BHD (IN LIQUIDATION) & ORS

COURT OF APPEAL, PUTRAJAYA
TENGKU BAHARUDIN SHAH JCA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
[CIVIL APPEAL NO: W-02-563-2003]
9 NOVEMBER 2007

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Motion to restrain liquidators from disposing of shares of company - Whether appeal would be rendered nugatory as shares formed subject matter of appeal - Special circumstances - Delay - Damages - Whether there were serious questions to be tried - Courts of Judicature Act 1964, ss. 44, 73*

This was a motion filed by the applicants pursuant to s. 44 of the Courts of Judicature Act 1964 ('CJA') for a restraining order against the liquidators of one Kian Joo Holdings Sdn Bhd (in Liquidation), premised upon the following grounds: (i) the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal by the applicants against the High Court's decision in favour of the liquidators, which was pending before the Court of Appeal; (ii) unless restrained, a successful appeal would be rendered nugatory and academic, thus causing irreparable harm to the applicants; (iii) it had always been the intention of the applicants' late father as well as the family that the shares be retained by the family; and (iv) the price was too low and would result in a multi-million ringgit loss in value of the investment.

Held (dismissing the applicants' motion)
Per Suriyadi Halim Omar JCA delivering the judgment of the court:

(1) The applicant's reason that the liquidators, unless restrained, would proceed to sell the 69,240,877 shares forming the subject matter of the appeal was quite unacceptable as these liquidators were officers of the court who merely wanted to perform their duties. Their decision to sell the shares at the

best possible price would benefit every shareholder including the applicants. The court here was not about to interfere with the liquidators' decision simply because its opinion might differ from that of the liquidators. Here, not only had the liquidators not shown bad faith or committed perverse errors but, as per the supporting affidavit, the applicants had also not adduced any evidence that such sale would cause irreparable damage to them. The intention of the applicants' late father to have the shares retained by the family coupled with the fear of losing them were inextricably intertwined to the fear of suffering a loss in value of the investment and were, regretfully, not special circumstances. Mere fear and sentimentality certainly do not qualify as persuasive grounds construable as special circumstances. The applicants also did not explain the delay of four years, since 13 June 2003, to apply for this injunction order. They had filed the notice of appeal on 3 July 2003 and the appeal records were filed on 26 August 2003. Despite the clarity of s. 73 of the CJA legislating that an appeal shall not operate as a stay, the applicants took no steps whatsoever for four years to apply for this order. The unexplained delay of four years was inordinate and inexcusable, and in the circumstances of this case, quite fatal to the applicants' motion. Furthermore, there was also no evidence adduced in the applicants' affidavit: (i) showing that damages would be inadequate compensation for their losses; and (ii) showing their capacity and capability of honouring their financial undertaking as to damages. Hence, in the circumstances, there was total failure on the part of the applicants to establish that there were serious questions to be tried which warranted such an injunction. (paras 14, 15, 16 & 18)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah usul yang difailkan oleh pemohon-pemohon di bawah s. 44 Akta Mahkamah Kehakiman 1964 ('AMK') untuk mendapatkan perintah tegahan terhadap penyelesai-penyelesai syarikat Kian Joo Holdings Sdn Bhd (dalam penyelesaian), berasaskan alasan-alasan berikut: (i) penyelesai-penyelesai akan menjual 69,240,877 saham-saham yang menjadi halperkara rayuan pemohon-pemohon terhadap keputusan Mahkamah Tinggi yang berpihak kepada penyelesai-penyelesai, rayuan mana masih berjalan

di Mahkamah Rayuan; (ii) kecuali ditegah, rayuan yang berjaya akan menjadi sia-sia dan akademik, sekaligus menyebabkan petaka yang tak dapat dipulihkan lagi kepada pemohon-pemohon; (iii) adalah menjadi niat mendiang ayah dan keluarga pemohon-pemohon bahawa saham-sham harus terus dipegang oleh keluarga; dan (iv) harga jualan terlalu rendah dan akan menyebabkan kerugian berjuta-juta ringgit dalam nilai pelaburan.

Diputuskan (menolak usul pemohon-pemohon)
Oleh Suriyadi Halim Omar HMR menyampaikan penghakiman mahkamah:

(1) Alasan pemohon-pemohon bahawa penyelesai-penyelesai, jika tidak ditegah, akan menjual 69,240,877 saham-saham yang menjadi halperkara rayuan agak tidak boleh diterima memandangkan penyelesai-penyelesai adalah pegawai-pegawai mahkamah yang hanya ingin melaksanakan tugas-tugas mereka. Keputusan mereka untuk menjual saham-saham pada harganya yang terbaik akan memanfaatkan setiap pemegang saham termasuk pemohon-pemohon. Mahkamah di sini tidak akan mengganggui keputusan penyelesai-penyelesai cuma kerana ia berbeza pendapat dengan penyelesai-penyelesai. Dalam kes ini, bukan sahaja penyelesai-penyelesai tidak menunjukkan sebarang niat tidak baik dan tidak melakukan kesilapan-kesilapan yang menjejaskan, tetapi, sebagaimana yang terserlah dari afidavit sokongan, pemohon-pemohon sendiri tidak mengemukakan keterangan bahawa penjualan akan menyebabkan kerugian yang tak boleh dipulihkan terhadap mereka. Niat mendiang bapa pemohon-pemohon supaya saham-saham terus dipegang oleh keluarganya ditambah dengan kebimbangan akan kehilangan saham-saham tersebut telah bertaut rapat dengan ketakutan akan mengalami kerugian nilai pelaburan. Malangnya semua itu bukanlah halkeadaan-halkeadaan istimewa. Perasaan bimbang semata-mata dan perasaan sentimen sememangnya bukan alasan-alasan persuasif yang boleh menjadi halkeadaan istimewa. Pemohon-pemohon juga tidak menjelaskan kelengahan selama empat tahun, bermula 13 Jun 2003, untuk memohon perintah injunksi. Mereka memfail notis rayuan pada 3 Julai 2003 dan rekod rayuan pada 26 Ogos 2003. Walaupun s. 73 AMK dengan jelas memperuntukan bahawa rayuan tidak beroperasi sebagai penangguhan, pemohon-pemohon, untuk

A tempoh empat tahun, tidak mengambil apa-apa langkah untuk memohon perintah ini. Kelengahan empat tahun yang tidak dijelaskan ini adalah kelengahan yang melampau dan tidak dapat dimaafkan, dan dalam halkeadaan kes, adalah fatal kepada usul pemohon-pemohon. Selain itu, tiada keterangan
B dikemukakan di dalam afidavit pemohon-pemohon yang menunjukkan: (i) bahawa pampasan adalah tidak mencukupi untuk menggantirugi kerugian-kerugian mereka; dan (ii) keupayaan mereka untuk memenuhi akujanji kewangan mereka berkaitan gantirugi. Oleh itu, wujud kegagalan total di pihak
C pemohon-pemohon untuk menunjukkan bahawa terdapat isu-isu serius yang perlu dibicarakan dan yang mewajarkan injunksi.

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Blue Town Investments Ltd v. Higgs and Hill plc [1990] 1 WLR 696 ***(refd)***
D

Brigid Foley Ltd v. Elliot [1982] RPC 433 ***(refd)***

Canton and United Breweries (NSW) Pty Ltd v. Bond Brewing New South Wales Ltd and Others [1988] 76 ALR 633 ***(refd)***

Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386 HC ***(refd)***

E *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow [1995] 4 CLJ 11 CA* ***(refd)***

Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1979] 1 LNS 19 HC ***(refd)***

Hj Wan Habib Syed Mahmud v. Datuk Patinggi Hj Abdul Taib Mahmud & Anor [1986] 2 CLJ 115; [1986] CLJ (Rep) 149 SC ***(refd)***

F *Keet Gerald Francis Noel John v. Mohd Noor & Ors [1995] 1 CLJ 293 CA* ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Nicholas & Ors v. Gan Realty Sdn Bhd & Ors [1970] 1 LNS 90 FC ***(refd)***

R v. Senate of the University of Aston, Ex parte Roffey and Another [1969] 2
G *All ER 964* ***(refd)***

Re Hans Place Ltd (in liquidation) [1993] BCLC 768 ***(refd)***

Shiraz Nominees (in liq) v. Collinson & Anor [1985] 10 ACLR 7 ***(refd)***

Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd [1978] 1 LNS 184 FC ***(refd)***

Zainal Abidin Putih & Anor v. Che Wan Dvpt. Sdn Bhd [1992] 3 CLJ
H *1539; [1992] 1 CLJ (Rep) 381 SC* ***(refd)***

Legislation referred to:

Companies Act 1965, s. 237(2)

Courts of Judicature Act 1964, ss. 44, 73

I

For the appellant - Izabella De Silva (Hasmaliza with her); M/s Iza Ng Yeoh & Kit

For the respondent - VK Lingam (VK Lashmi with him); M/s VK Lingam & Co

For liquidators - DB Naban (Bahari Yeow with him); M/s Lee Hishammuddin Allen & Gledhill

[Appeal from High Court, Kuala Lumpur; Companies Winding-Up No: D4-28-294-1994]

Reported by Suresh Nathan

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The applicants had filed encl. 7(a), hereinafter referred to as the motion, and had prayed for the following reliefs:

> (1) an order that the liquidators of the Kian Joo Holdings Sdn Bhd (in Liquidation) be restrained, whether by themselves or by their servants otherwise from disposing 45% of the 153,868,617 Kian Joo Can Factory Berhad shares totaling 69,240,877 ordinary shares of RM0.25 each; and
>
> (2) such other or further order that this Honourable Court deems just and necessary.

[2] The grounds of this application are that unless an injunction is granted pending the hearing and disposal of this appeal, the liquidators of the Kian Joo Holdings Sdn Bhd (in Liquidation) will proceed to sell all the 69,240,877 shares forming the subject matter of this appeal making this appeal if successful, nugatory and therefore academic as causing irreparable harm to the appellants, more fully explained in the affidavit of Dato' See Teow Guan affirmed on 2 July 2007 in support of this application.

[3] We had unanimously dismissed the motion with costs. We now state our reasons.

[4] But first of all how did this motion come about? To answer that question there is a need first to peruse its antecedents. Kian Joo Holdings Sdn Bhd (hereinafter referred to as the company) was incorporated on 27 March 1982 having 27 shareholders who were all members of the See family. On 10 September 1994 a

petition was filed, as per Kuala Lumpur High Court Companies (Winding-up) No D4-28-294-94, to wind up the company. Subsequently by consent of the parties, the High Court on 30 January 1996 had ordered that the company be wound up, and liquidators appointed.

[5] On 12 July 1996, the liquidators convened a meeting of the contributories of the company pursuant to s. 237(2) of the Companies Act 1965, to ascertain their wishes regarding the disposal of the shares and warrants in its possession. In that meeting 2 groups emerged *viz.* the See Teow Chuan contributories (STC group) and the See Teow Guan contributories (STG group or the applicants). Basically they were siblings. At that meeting and confirmed in another, it was resolved that 55% in value and 52% in number of the contributories (that is the STC group) preferred a sale of the shares and warrants, whilst the remaining holders of 45% in value and 48% in number of the shares (the STG group) preferred distribution of the shares and warrants in specie.

[6] Thereafter the liquidators, after coming into possession of the properties and after the said meetings, had wanted to implement the majority decision. Being aggrieved the STG group had filed in court an application (encl. 191) to modify the said decision. Enclosure 191 reads as follows:

> 1. That the Court modify the decision of the Liquidators to sell the entire controlling block of 42,741,276 Kian Joo Can Factory Berhad shares and 5,698, 835 warrants by excluding from the sale 19,233,039 Kian Joo Can Factory Berhad shares and 2,564,404 warrants representing 45% proportionate shares entitlement of the Petitioners, Doris See Slew Lian and See Siew Hua.
>
> 2. That the Court direct the Liquidators to distribute in specie to the Petitioners, Doris See Siew Lian and See Siew Hua proportionate number of Kian Joo Can Factory Berhad shares and warrants according to the Schedule annexed.
>
> 3. That the costs of this application be taxed and paid to the Petitioners by the Liquidators out of the Company's accumulated funds.
>
> 4. An injunction restraining the Liquidators from disposal of Kian Joo Can Factory Berhad shares and warrants.

[7] At the end of the hearing of encl. 191, the High Court found that the STG group had failed to show how the liquidators had acted fraudulently or were *mala fide* in the exercise of their discretion, to warrant intervention by the court. In the result encl. 191 on 13 June 2003 was dismissed with costs. Being dissatisfied the applicants had filed an appeal. The appeal is now pending before the Court of Appeal.

[8] On 12 June 2007 the liquidators placed an advertisement in The Star inviting expression of interest from eligible buyers for the shares of Kian Joo Can Factory Berhad held by the company. The applicants filed the motion on 3 July 2007. The motion and the supporting affidavit supplied the following grounds for the reasons why the restraining order was sought, in that unless the reliefs were granted:

1. the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal;

2. unless restrained, a successful appeal would be rendered nugatory and academic, thus causing irreparable harm to the appellants;

3. it had always been the intention of their late father as well as the family that these shares be retained by the family; and

4. the price was too low and would result in multi million ringgit loss in value of the investment.

[9] The motion was made pursuant to s. 44 of the Courts of Judicature Act 1964 which provision reads as follows:

Section 44

(1) In any proceeding pending before the Court of Appeal any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent prejudice to the claims of parties pending the hearing of the proceeding, any order for security for costs, and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Court of Appeal.

(2) Every application under subsection (1) shall be deemed to be a proceeding in the Court of Appeal.

A (3) Every order made under subsection (1) may, upon application by the aggrieved party made within ten days after the order is served, be affirmed, varied or discharged by the Court.

[10] As gleaned from the above, s. 44 of the Courts of Judicature Act 1964, empowers the Court of Appeal to grant any order that B can preserve the integrity of any appeal pending before it. Previously for like-issues, an appellant had to establish 'special circumstances' that warranted a stay of proceedings or of execution, in order to preserve the integrity of the appeal. Recent developments have shown that Malaysian courts have now shifted C to more practical and less stringent approaches. In matters governing an application for a stay, or any other form of interim order, the approach is that no successful appeal should be rendered nugatory at the end of the day. Despite this pragmatic approach, there is no blank cheque that demands automatic D granting of a restraining order in order to avoid any appeal being rendered nugatory. Persuasive reasons must still be ventilated and established to ensure a successful motion.

[11] The applicants' prayer here for a restraining order, of the E liquidators whether by themselves or by their servants or otherwise, of disposing the shares was in effect and substance an interlocutory injunction. In fact the very motion had alluded to that terminology. Bearing in mind the prohibitive nature of this order, as said above unless persuasive reasons were supplied, the F motion was doomed to fail. In *Sivaperuman v. Heah Seok Yeong Realty Sdn Bhd* [1978] 1 LNS 184 the Federal Court had held that:

> The first is that it is couched in prohibitory terms restraining the G appellant until the trial of the suit from remaining in the quarters but it is in effect a mandatory injunction. Equity looks to the substance and intent and not to the form, and the interlocutory injunction sought and granted although prohibitory in language is mandatory in substance and effect (*Shepherd Homes Ltd. v. Sandham* (at p. 359); *Hounslow Local Borough Council v. Twinckenham Garden Developments Ltd.* (at p. 570-1) and as I said H in my judgment in *Wah Long (Jelapang) Tin Mine Sendirian Berhad v. Chai Nyen Yiok*, **an interim or interlocutory mandatory injunction is never granted before trial save in exceptional and extremely rare cases** (emphasis mine).

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[12] It is quite established that an injunction for the preservation of property and other mandatory orders may only be granted in accordance with the principles applicable to the granting of interlocutory injunctions. It may be granted where the court is satisfied that there is a substantial question to be tried, and a case has been made out for the preservation of that property (*Nicholas & Ors v. Gan Realty Sdn Bhd & Ors* [1970] 1 LNS 90). And as in the *American Cyanamid* Case [1975] AC 396, smack on the issue of injunctions, there is the requirement that before a court exercises its discretion in favour of granting an injunction:

(1) there must be a serious question to be tried;

(2) there must not be any delay by the appellants in making the application;

(3) that if the appellants were to succeed at the appeal, damages would not be adequate compensation for its loss;

(4) that the balance of convenience lies in its favour; and

(5) the appellants must demonstrate evidence that its financial undertaking given to court is solid and worth powder and shot; and

(6) there are special circumstances in its favour including the justice of the case.

[13] At this interlocutory stage it is not the function of the court to resolve the issues on conflicting affidavit evidence, inclusive of difficult questions of law that require detailed argument or mature considerations.

[14] Let us now scrutinize the reasons for the motion. The first reason was that unless restrained the liquidators would proceed to sell the 69,240,877 shares forming the subject matter of the appeal. That was a reason that was quite unacceptable as these liquidators were appointed by the court, and hence officers of the court, who merely wanted to perform their duties (*Zainal Abidin Putih & Anor v. Che Wan Dvpt Sdn Bhd* [1992] 3 CLJ 1539; [1992] 1 CLJ (Rep) 381; *Chi Liung Holdings Sdn Bhd v. Ng Pyak Yeow* [1995] 4 CLJ 11). Their decision to sell the shares at the best possible price would have benefited every shareholder including the applicants. The court here was not about to interfere

with the liquidators' decision simply because its opinion might differ from that of the liquidator. Here, not only was there not shown bad faith or perverse errors had been committed by the liquidators, but as per the supporting affidavit, the applicants had also not adduced any evidence that such sale would have caused irreparable damage to them (*Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd* [1979] 1 LNS 19; *Shiraz Nominees (in liq) v. Collinson & Anor* [1985] 10ACLR 7). In *Re Hans Place Ltd (in liquidation)* [1993] BCLC 768 the court there had stated, amongst others:

> ... The court would only interfere with the exercise of the liquidator's discretion where he acted in bad faith or his decision was perverse and since there were no allegations of this nature the court would not interfere.

[15] Ground 3, ie, the intention of their late father to have the shares retained by the family coupled with the fear of losing them, were inextricably intertwined to the fear of suffering a loss in value of the investment (ground 4). Regretfully these are not special circumstances (*Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1). Mere fear and sentimentality certainly do not qualify as persuasive grounds construable as special circumstances.

[16] Unexplained here too was the delay of four years by the applicants since 13 June 2003 to apply for this injunction order. They had filed the notice of appeal on 3 July 2003 and the appeal records were filed on 26 August 2003. Despite the conspicuous clarity of s. 73 of the Courts of Judicature Act 1964, legislating that an appeal shall not operate as a stay, the applicants took no steps whatsoever for four years to apply for this order. The unexplained delay of four years was inordinate and inexcusable and in the circumstances of the case quite fatal to the applicants' motion (*Hj Wan Habib Syed Mahmud v. Datuk Patinggi Hj Abdul Taib Mahmud & Anor* [1986] 2 CLJ 115; [1986] CLJ (Rep) 149; *Evercrisp Snack Products Sdn Bhd v. Sweeties Food Industries Sdn Bhd* [1979] 1 LNS 19; *Blue Town Investments Ltd v. Higgs and Hill plc* (1990) 1 WLR 696). In the case of *Canton and United Breweries (NSW) Pty Ltd v. Bond Brewing New South Wales Ltd and Others* [1988] 76 ALR 633 at p. 633 the Federal Court of Australia had as per the head note stated:

> (iii) The applicant's delay was a sufficient reason for refusing an interim injunction

[17] In the case of *R. v. Senate of the University of Aston, Ex parte Roffey and Another* [1969] 2 All ER 964 at p. 976 Donaldson, J had opined in the following manner:

> In this situation I regard the time factor as decisive. The prerogative remedies are exceptional in their nature and should not be made available to those who sleep on their rights. The applicant Pantridge's complaint is that he was not allowed to re-sit the whole examination in June 1968 and, if successful, proceed to the pass degree course in the 1968-69 academic year, yet he did not even apply to move this court until July 1968. By such inaction, in my judgment he forfeited whatever claims he might otherwise have had to the courts intervention. I would therefore refuse the relief sought.

[18] It was of the court's view that there was total failure on the part of the applicants to establish that there were serious questions to be tried which warranted such an injunction. As stated above, the fear of losing control of the shares, and suffering certain economic losses, did not qualify as serious questions to be tried. To make matters worse there was inordinate and inexcusable delay in filing this motion, in the light of the appeal having been filed in August 2003 whilst this motion being filed in 2007. In fact there was also no evidence adduced in the applicants' affidavit:

i. showing that damages would be inadequate compensation for their losses; and

ii. no evidence adduced to show their capacity and capability of honouring their financial undertaking as to damages (*Brigid Foley Ltd v. Elliot* [1982] RPC 433; *Keet Gerald Francis Noel John v. Mohd Noor & Ors* [1995] 1 CLJ 293; *Cheah Theam Swee & Anor v. Overseas Union Bank Ltd & Ors* [1989] 1 CLJ 157; [1989] 1 CLJ (Rep) 386).

[19] It was for all the above reasons that we had dismissed the motion with costs.